



[6450-01-P]

DEPARTMENT OF ENERGY

10 CFR Part 851

RIN 1992-AA50

Worker Safety and Health Program; Technical Amendments

AGENCY: Office of Environment, Health, Safety and Security, U.S. Department of Energy.

ACTION: Final rule; technical amendment.

SUMMARY: The Department of Energy (DOE) is amending the worker safety and health program rule to clarify references in the regulation to the Occupational Safety and Health Administration's permissible exposure limit for beryllium and updating references to organizations and documents. The regulatory amendments do not alter substantive rights or obligations under current law.

DATES: This rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Jacqueline D. Rogers, U.S. Department of Energy, Office of Environment, Health, Safety and Security, Mailstop AU-11, 1000 Independence Ave., SW, Washington, D.C. 20585, telephone: (202) 586-4714, or E-mail: jackie.rogers@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction

In 2006, when DOE promulgated 10 CFR part 851, "Worker Safety and Health Program," it adopted the Occupational Safety and Health Administration's (OSHA) permissible exposure limit (PEL) for beryllium in 29 CFR 1910.1000, "Air Contaminants." Section 851.23(a)(1) of

part 851 also requires DOE contractors to comply with the requirements in 10 CFR part 850, “Chronic Beryllium Disease Prevention Program.”

OSHA has published in the Federal Register a notice that proposes a new comprehensive health standard for beryllium in 29 CFR part 1910, “Subpart Z Toxic and Hazardous Substances,” which will include a new PEL and ancillary provisions. Currently, OSHA only regulates beryllium through a PEL. DOE’s regulation “Worker Safety and Health Program” at 10 CFR 851.23(a)(3) requires DOE contractors among other things to comply with OSHA’s PEL for beryllium. To date, OSHA has not established any ancillary requirements for the regulation of beryllium exposure. Consequently, there are currently no conflicts between the requirement in 10 CFR part 851 to comply with OSHA’s regulation, including OSHA’s PEL, and the remaining requirements of 10 CFR parts 850 and 851. However, should OSHA adopt a comprehensive standard for beryllium, as OSHA recently proposed in the Federal Register, there may be confusion among DOE and DOE contractors regarding which standard would apply at DOE sites. The technical amendment clarifies that it is DOE’s intent to only apply OSHA’s PEL for beryllium, and that DOE and DOE contractors would not be subject to any other beryllium-specific OSHA requirements, including the ancillary provisions OSHA has recently proposed to add to its health standard (e.g., exposure assessment, personal protective clothing and equipment, medical surveillance, medical removal, training, and regulated areas or access control). The Department expects its employees, including contractors to continue to implement the provisions of 10 CFR part 850 at DOE sites.

The Department is also making technical amendments to 10 CFR part 851, Appendix A, Section 7, “Biological Safety,” to avoid confusion within the DOE community regarding the

correct terminology, the identity of the agency responsible for biohazards, and the correct forms to use for select agents.

This final rule has been approved by the Secretary of Energy.

II. Procedural Requirements

A. Review Under Executive Order 12866

This regulatory action has been determined not to be “a significant regulatory action” under Executive Order 12866, “Regulatory Planning and Review,” 58 FR 51735 (October 4, 1993). Accordingly, this action was not subject to review under that Executive Order by the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

B. Review Under the Regulatory Flexibility Act.

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies to ensure that the potential impacts of its draft rules on small entities are properly considered during the rulemaking process (68 FR 7990, February 19, 2003), and has made them available on the Office of General Counsel’s Web site: <http://energy.gov/gc/office-general-counsel>.

The regulatory amendments in this notice of final rulemaking reflect technical amendments, and clarify DOE’s intent to continue to only apply OSHA’s PEL for beryllium, and to not apply to DOE and DOE contractors any other beryllium-specific OSHA requirements that may be promulgated in the future. Rights and obligations under 10 CFR part 851 are unaltered and as

such, are not subject to the requirement for a general notice of proposed rulemaking under the Administrative Procedure Act (5 U.S.C. 553(a)(2)) (APA). There is no requirement under the APA or any other law that this rule be proposed for public comment. Consequently, this rulemaking is exempt from the requirements of the Regulatory Flexibility Act.

C. Review Under the Paperwork Reduction Act

This final rule does not impose a collection of information requirement subject to the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

D. Review Under the National Environmental Policy Act

DOE has concluded that promulgation of this rule falls into a class of actions that would not individually or cumulatively have a significant impact on the human environment, as determined by DOE's regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Specifically, this rule amends existing regulations without changing the environmental effect of the regulations being amended, and, therefore, is covered under the Categorical Exclusion in paragraph A5 of Appendix A to subpart D, 10 CFR part 1021. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review Under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 10, 1999) imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by

State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation process it will follow in the development of such regulations (65 FR 13735). DOE has examined this rule and has determined that it does not preempt State law and does not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, “Civil Justice Reform” (61 FR 4729, February 7, 1996), imposes on Federal agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. Section 3(b)(2) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any, to be given to the regulation; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any, to be given to the regulation; (5) defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. DOE has completed the required

review and determined that, to the extent permitted by law, this final rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to assess the effects of a Federal regulatory action on State, local, and tribal governments, and the private sector. DOE has determined that this regulatory action does not impose a Federal mandate on State, local or tribal governments or on the private sector.

H. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. This rule would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

I. Review Under the Treasury and General Government Appropriations Act, 2001

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB’s guidelines were published at 67 FR 8452 (February 22, 2002), and DOE’s guidelines were published at 67 FR 62446 (October 7, 2002). DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

J. Review Under Executive Order 13211

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to the OIRA, which is part of OMB, a Statement of Energy Effects for any proposed significant energy action. A “significant energy action” is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and is likely to have a significant adverse effect on the supply, distribution, or use of energy, or (2) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This regulatory action is not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

K. Administrative Procedure Act

An agency may find good cause to exempt a rule from the requirement for a notice of proposed rulemaking and the opportunity for public comment under the APA if the requirement is determined to be unnecessary, impracticable, or contrary to the public interest under 5 U.S.C. 533(b)(3)(B). The rule clarifies references in 10 CFR part 851 concerning its adoption of provisions found in 29 CFR part 1910, and updates references to organizations and documents. The first change in this rule is to add “Occupational Safety and Health Administration beryllium requirements except for any permissible exposure limit for beryllium in 29 CFR 1910.1000” to the list of exclusions from 10 CFR part 851, found in 10 CFR 851.2. The second change in this rule is the addition of the words “and 29 CFR 1910.1000, Beryllium” at the end of 10 CFR

851.23(a)(3). Safety and Health requirements relating to DOE and DOE contractors' employees' exposure to beryllium are and will continue to be covered by 10 CFR part 850, "Chronic Beryllium Disease Prevention Program." The updates of referenced organizations and documents in 10 CFR part 851, Appendix A, Section 7 are strictly technical amendments. Consequently, good cause exists for issuing this amendment as a final rule as notice and comment is unnecessary.

L. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of this final rule prior to the effective date set forth at the outset of this rulemaking. The report will state that it has been determined that the rule is not a "major rule" as defined by 5 U.S.C. 801(2).

List of Subjects in 10 CFR Part 851

Civil penalty, Federal buildings and facilities, Occupational safety and health, Safety, Reporting and recordkeeping requirements.

Issued in Washington, D.C., on October 15, 2015.

Matthew B. Moury
Associate Under Secretary for
Environment, Health, Safety and Security

For the reasons set forth in the preamble, the Department of Energy amends part 851 of chapter III of title 10 of the Code of Federal Regulations as set forth below:

PART 851—WORKER SAFETY AND HEALTH PROGRAM

1. The authority citation for part 851 continues to read as follows:

Authority: 42 U.S.C. 2201(i)(3), (p); 42 U.S.C. 2282c; 42 U.S.C. 5801 *et seq.*; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

2. Section 851.2 is amended by adding paragraph (d) to read as follows:

§ 851.2 Exclusions.

* * * * *

(d) This part does not require compliance with any Occupational Safety and Health Administration beryllium requirement except for any permissible exposure limit for beryllium in 29 CFR 1910.1000.

§ 851.23 [Amended]

3. Section 851.23 is amended in paragraph (a)(3) by adding at the end of the sentence “, and 29 CFR 1910.1000, *Beryllium*”.

4. Appendix A, section 7, Biological Safety, is amended:

- a. In paragraph (a)(1)(i) by adding “, United States Department of Agriculture Animal and Plant Health Inspection Service (USDA/APHIS)” in the first sentence, after “(WHO)”;
- and
- b. By revising paragraphs (a)(3) and (4) to read as follows:

Appendix A to Part 851—Worker Safety and Health Functional Areas

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7. * * *

(a) * * *

(3) Provides for submission to the appropriate Head of DOE Field Element, for review and concurrence before transmittal to the Federal Select Agent Program, each Laboratory Registration/Select Agent Program registration application package (APHIS/CDC Form 1, Application for Registration for Possession, Use, and Transfer of Select Agents and Toxins) requesting registration of (or amendment to a previously approved registration) a laboratory facility for the purpose of possessing, using, or transferring biological select agents and/or toxins.

(4) Provides for submission to the appropriate Head of DOE Field Element, a copy of each APHIS/CDC Form 2, Request to Transfer Select Agents and Toxins, upon initial submission of APHIS/CDC Form 2 to a vendor or other supplier requesting or ordering a biological select agent or toxin for transfer, receipt, and handling in the registered facility; and submission to the appropriate Head of DOE Field Element the completed copy of the APHIS/CDC Form 2, documenting final disposition and/or destruction of the select agent or toxin, within 10 days of completion of the APHIS/CDC Form 2.

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[FR Doc. 2015-28575 Filed: 11/9/2015 8:45 am; Publication Date: 11/10/2015]